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# Supreme Court Case Study 12



## The Rights of People of Suspect Ethnic Backgrounds *Korematsu v. United States*

### \*\*\*\*\* Background of the Case \*\*\*\*\*

After the bombing of Pearl Harbor in December 1941 by Japanese planes, anti-Japanese sentiment on the West Coast rose to almost hysterical proportions. All people of Japanese ancestry, even citizens of the United States, were suspected of being pro-Japan, or worse—saboteurs and spies for Japan. Yielding to such sentiments, President Franklin D. Roosevelt issued an executive order that authorized the military to evacuate and relocate “all or any persons” in order to provide “protection against espionage and against sabotage to national defense. . . .” The military first set curfews on the West Coast for persons of Japanese ancestry. Later the military removed all persons of Japanese ancestry to war relocation centers. The order affected approximately 112,000 persons of Japanese ancestry, of whom about 70,000 were native-born American citizens. An act of Congress later reinforced the president’s order by providing penalties for violations.

Korematsu, a Japanese American citizen, refused to leave his home in California for a relocation camp. He was convicted in a federal court. His appeal to a United States circuit court failed, and he then brought the case before the United States Supreme Court.

### *Constitutional Issue* \*\*\*\*\*

Since the president is commander in chief of the armed forces and Congress is given the power to declare war, was the executive order and its Congressional counterpart a constitutional exercise of the war power?

### \*\*\*\*\* The Supreme Court’s Decision \*\*\*\*\*

The Court decided against Korematsu by a vote of 6 to 3. Justice Hugo Black wrote for the Court.

In 1943 the Court had upheld the government’s position in a similar case, *Hirabayashi v. United States*. That case concerned the legality of the West Coast curfew order. In *Hirabayashi*, as well as in *Korematsu*, the Court’s language pointed toward the necessity of giving the military the benefit of the doubt on the grounds of wartime necessity.

In the earlier case, the Court had held that “we cannot reject as unfounded the judgment of the military authorities and of Congress. . . .” Likewise, in the *Korematsu* case, the Court declared, “We are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast area at the time they did.”

Justice Black cited evidence that, following internment, “approximately five thousand citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.” Although the Court admitted awareness of the hardships internment imposed on American citizens, it stated “hardships are part of war. . . . Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.”

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(continued)

### Supreme Court Case Study 12 (continued)



The question of racial prejudice “merely confuses the issue,” said the Court. The true issues are related to determining “military dangers” and “military urgency.” These issues demanded that citizens of Japanese ancestry be relocated by the military authorities. Black observed, “Congress, reposing its confidence in this time of war in our military leaders. . . , determined that they should have the power to do just this. . . . The need for action was great, and the time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.”

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ **Dissenting Opinion** ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

Justices Frank Murphy and Robert H. Jackson wrote separate dissents. Murphy called the Court’s decision “legalization of racism.” He objected particularly on the grounds that the Japanese Americans affected had been deprived of equal protection of the law as guaranteed by the Fifth Amendment. Further, Murphy wrote, as no provision had been made for hearings “this order also deprives them of all their constitutional rights to procedural due process.” He saw no reason why the United States could not have done as Great Britain had done earlier in hearings during which about 74,000 German and Austrians residing in Britain were examined. Of these, only 2,000 had been interned.

In his dissent, Justice Jackson conceded that there might have been reasonable grounds for the internment orders. But, he wrote, “Even if they were permissible military procedures, I deny that it follows that they are constitutional. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.”

After the war, many people realized the injustice of the Court’s decision. Finally, in 1988, Congress issued a formal apology to all internees and voted to give every survivor of the camps \$20,000 in reparation.



**Questions** ★

**DIRECTIONS:** Answer the following questions on a separate sheet of paper.

- 1. On what constitutional basis did the Supreme Court deny Korematsu’s appeal?
- 2. If you had been a native-born Japanese American in 1942, what do you think would have been your reaction to the internment order?
- 3. Justice Black became known as one of the staunchest defenders of the rights provided in the first ten amendments. Is his decision in the *Korematsu* case in keeping with his reputation?
- 4. What was the constitutional basis of Justice Murphy’s dissent?
- 5. The Court’s decision in the *Korematsu* case has been described as involving “the most alarming use of military authority in our nation’s history.” Do you think this description of the case is justified?

**Korematsu v. United States** (From Facing History and Ourselves, *Farewell to Manzanar* study guide)

*When the evacuation order was issued in the spring of 1942, Fred Toyosaburo Korematsu changed his name and underwent plastic surgery to disguise his identity. He then took a job as a welder. In May, he was arrested in Oakland, California, for violating the curfew and failing to obey evacuation orders. After the lower courts found Korematsu guilty, he appealed his case to the Supreme Court. The statements below are excerpts from the justices' opinions.*

**Associate Justice Robert H. Jackson:**

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country.... Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

**Justice Hugo Black:**

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

**Justice Frank Murphy:**

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

## Proclamation 4417: An American Promise

*In the years after World War II, a number of Americans asked the government to right wrongs done to Japanese Americans on the West Coast by repaying them for the homes, businesses, and other property they lost. The first step came in 1948 with the passage of the Japanese American Claims Act. It set aside \$38 million to satisfy some 23,000 claims totaling \$131 million. Lawmakers refused to consider further action until the 1970s. In 1976, at the urging of many Americans, President Gerald R. Ford issued this statement.*

In this Bicentennial Year, we are commemorating the anniversary dates of many of the great events in American history. An honest reckoning, however, must include a recognition of our national mistakes as well as our national achievements. Learning from our mistakes is not pleasant, but as a great philosopher once admonished, we must do so if we want to avoid repeating them.

February 19th is the anniversary of a sad day in American history. It was on that date in 1942, in the midst of the response to the hostilities that began on December 7, 1941, that Executive Order No. 9066 was issued, subsequently enforced by the criminal penalties of a statute enacted March 21, 1942, resulting in the uprooting of loyal Americans. Over one hundred thousand persons of Japanese ancestry were removed from their homes, detained in special camps, and eventually relocated.

The tremendous effort by the War Relocation Authority and concerned Americans for the welfare of these Japanese-Americans may add perspective to that story, but it does not erase the setback to fundamental American principles. Fortunately, the Japanese-American community in Hawaii was spared the indignities suffered by those on our mainland.

We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans. On the battlefield and at home, Japanese-Americans—names like Hamada, Mitsumori, Marimoto, Noguchi, Yamasaki, Kido, Munemori and Miyamura—have been and continue to be written in our history for the sacrifices and the contributions they have made to the well-being and security of this, our common Nation.

The Executive order that was issued on February 19, 1942, was for the sole purpose of prosecuting the war with the Axis Powers, and ceased to be effective with the end of those hostilities. Because there was no formal statement of its termination, however, there is concern among many Japanese-Americans that there may yet be some life in that obsolete document. I think it appropriate, in this our Bicentennial Year, to remove all doubt on that matter, and to make clear our commitment in the future.

NOW, THEREFORE, I, GERALD R. FORD, President of the United States of America, do hereby proclaim that all the authority conferred by Executive Order No. 9066 terminated upon the issuance of Proclamation No. 2714, which formally proclaimed the cessation of the hostilities of World War II on December 31, 1946.

I call upon the American people to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated....

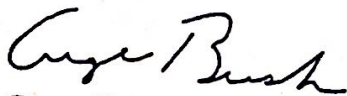
## A Letter to Japanese Americans

*In 1980, President Jimmy Carter created the Commission on the Wartime Relocation and Internment of Civilians. In 1983, members asked Congress to issue a formal apology to Japanese Americans and the President to pardon anyone convicted of resisting wartime restrictions on Americans of Japanese descent. The group also recommended that every living Japanese American who had been imprisoned during the war be awarded a one-time tax-free payment of \$20,000. Five years later, Congress carried out those recommendations by passing the Civil Rights Act of 1988. Payments to survivors began in 1990 and ended in 1998. After the law was passed, President George W. Bush sent the following letter to every Japanese American who was interred during the war.*

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

Sincerely,



George Bush

President of the United States.

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## **Korematsu Takes on Bush and Guantanamo Bay Internment Camp**

By Jonathan Turley

First published by the Los Angeles Times, November 17, 2003

Largely unnoticed in the hustle and bustle of politics, a quiet and frail 82-year-old man made a symbolic return to Washington, D.C., this month.

His name is Fred Korematsu, and his name graces one of the most infamous decisions ever rendered by the U.S. Supreme Court, the 1944 case of *Korematsu vs. United States*. With that decision, Korematsu was sent to internment camps to join 120,000 other Japanese Americans who were imprisoned solely because of their ethnicity.

Recently, Korematsu filed a brief before that same court on behalf of hundreds of Muslims being held at Guantanamo Bay, Cuba. For Korematsu and thousands of camp survivors, one of the darkest and most painful chapters of American history is repeating itself.

The Korematsu case has been largely taught in law schools as an abomination, a case in which the Supreme Court yielded to fear and pressure in sending tens of thousands of innocent men, women and children into camps.

Then came 9/11.

Soon, the Bush administration was relying on the arguments from the Korematsu case to assert the same authority exercised by President Franklin Delano Roosevelt to put individuals into detention without trial or access to the courts.

The administration has further argued that the president may do with the Guantanamo detainees as he wishes, including executing them under his own set of rules and standards.

By locating the camp in Cuba, the president holds that his actions are no longer controlled by constitutional law. Despite the fact that Guantanamo Bay is a sealed, highly armed U.S. military base, the court has previously held that it is legally "foreign" territory under the control of Cuban President Fidel Castro.

Of course, unlike World War II, there is no declared war against a nation-state. Rather, the president has declared war on terrorism, which is a category of crime. Under this interpretation, any president could declare such a war and claim wartime authority to indefinitely detain people and even execute them without access to the courts.

Korematsu has heard much of this before -- 60 years ago.

In 1942, he was 22 years old and had twice tried to enlist in the Army to serve his country, only to be turned down for a physical disability. On Feb. 19, 1942, Roosevelt issued Executive Order No. 9066, giving the military's Western Defense Command the authority to issue any orders that it deemed necessary to protect the nation -- the legal basis for the camps.

Korematsu desperately fought to remain free. He changed his name to Clyde and underwent eyelid surgery to look less Asian. It didn't work. He was arrested and thrown into a race-track horse stall to await "processing."

These are events that most Americans thought could never happen again. After all, Korematsu was given the Medal of Freedom in 1998 (the highest U.S. civilian honor) for his fight against internment, and Congress awarded reparations to the Japanese Americans sent to the camps. President Bush's father, President George H.W. Bush, apologized to Japanese Americans on behalf of the U.S.

Yet, last year, Korematsu, who lives in Northern California, watched as hundreds of people were sent to a camp in Cuba without hearings required under international law or access to U.S. courts. He watched as U.S. citizens were being stripped of their constitutional rights as "enemy combatants" and held in this country effectively as non-persons.

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A new president was citing a new threat, but the claim of absolute power remained.

That is when Korematsu resolved to go back before the court that had failed him and thousands of other citizens decades before. His statement to the court in his brief is simple: "[t]o avoid repeating the mistakes of the past, this court should make clear that the United States respects fundamental constitutional and human rights -- even in time of war."

The return of Fred Korematsu should be a source of great shame for members of the Supreme Court.

Although other justices penned the 1944 decision, the institution failed the primary test of an independent judiciary: the ability to stand before the mob and to refuse to give legitimacy to racist impulse. Rather than being the bulwark against hate, the court became its vehicle.

After the 1944 opinion, some on the court regretted their actions, and the California attorney general who advocated mass internment, Earl Warren (later a chief justice of the Supreme Court), described himself as "conscience-stricken" over his role on the camps.

Warren's regrets, however, are not apparently shared by some members of the current court, particularly Chief Justice William Rehnquist. In his 1998 book, "All the Laws but One," Rehnquist defended the basis for the Korematsu decision and stated menacingly that "[t]here is no reason to think ... that future justices of the Supreme Court will decide questions differently."

While agreeing that some criticism of the 1944 ruling might be warranted, Rehnquist seems to endorse a variation on the ancient maxim "inter arma silent leges" -- "in times of war, the law is silent." Rehnquist suggests that while laws may "not be silent in times of war ... they will speak with a somewhat different voice."

That is a voice that Korematsu has already heard.

*Jonathan Turley is a professor of law at George Washington University.*

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**Editor's note:** Fred Korematsu died on March 30, 2005.

[http://reclaimdemocracy.org/civil\\_rights/korematsu\\_guantanamo.html](http://reclaimdemocracy.org/civil_rights/korematsu_guantanamo.html)